PUBLIC PROSECUTOR

v.

HAMZAIN YUSOFF & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CRIMINAL REVISION NO. 43-10-91]
17 JUNE 1991

CUSTOMS AND EXCISE: *Forfeiture orders of conveyance and goods as a result of guilty plea by co-accused - Preconditions of relevant section of statute - Commission of offence - Use of conveyance and goods in the commission of the offence - Meaning of "shall" - Mandatory - Customs Act 1967, ss. 26(a), 126, 127, 128.*

The 5 accused, D1 to D5, were charged with an offence under s. 26(a) of the Customs Act 1967 (the Act); D4 was the owner of the boat P24 and D5 was the owner of the goods. Without the knowledge of D1, D4 and D5 who had claimed trial, D2 and D3 pleaded guilty as a result of which P24 and the goods stated in the charge were forfeited by the Court.

D4 and D5 contended that the forfeiture orders should not have been made by the Magistrate before the disposal of the case against them as these orders had deprived them of their right to be heard with regard to their legitimate rights to P24 and the goods.

Held:

[1] Before a forfeiture order can be made under ss. 127 and 128 of the Act, the Court must be satisfied that an offence under the said Act or any regulations made thereunder has been committed.

[2] In this case, as D2 and D3 had pleaded guilty to the charge, an offence under the Act had been committed - the Act does not specify that the owner of the goods or the conveyance must be guilty of an offence before a forfeiture order can be made.

[3] The word "shall" in ss. 127(1) and 128(4) of the Act clearly imposes upon the Court an obligation to order forfeiture once the stated preconditions are satisfied that is, that the goods were the subject matter of the offence or the conveyance was used in the commission of such an offence. There is no requirement in that section that before a forfeiture order can be made, the owner of the goods or the conveyance must be guilty of an offence and there is no discretion given to the Court to call the owner and anyone else who may have a legitimate interest in the goods to show cause why it should not be forfeited.

[Forfeiture orders of Magistrate upheld.]

Case referred to:
Keng Soon Finance Bhd. v. Pengarah Kanan Kastam, Johore Bahru [1981] 2 MLJ 249

Legislation referred to:
Customs Act 1967, ss. 26(a), 126, 127(1), (4), 128(2), (4), 138

For the DPP - Tan Poh Lai
For the 1st, 4th & 5th accused - Susan Ling

JUDGMENT

James Foong JC:

On 19 February 1991, 5 persons were charged with an offence in the Magistrate's Court at Mersing which reads as follows:

> Bahawa kamu Hamzain b. Yusoff, Runzah b. M. Ali, Darwin b. Umar, Yusoff b. Hussein dan Zainab bt. Ibrahim pada kira-kira pukul 12.50 pagi pada 19 Februari 1991 di Jetty Minyak, Jalan Mohd. Aris, Sungai Muka Dua, Mersing, Johor, telah memuatkan barang-barang untuk diekspot melalui laut, di tempat mendarat selain daripada tempat mendarat yang sah di sisi undang-undang dan ini bertentangan dengan s. 26(a) dan kamu boleh dihukum di bawah s. 138, Akta Kastam 1967.

The 4th accused was the owner of the boat (tendered as Exhibit P24) in this case.

The 5th accused was the owner of the goods in this case.

On 25 March 1991 without the knowledge of the 1st, 4th and 5th accused (who had earlier claimed trial) the 2nd and 3rd accused of Indonesian origin pleaded guilty to the charge. Each of them was fined RM2,000 and in default 3 months jail. More importantly, P24 and the goods stated in the charge were forfeited by the Court in pursuant to the pleas by the 2nd and 3rd accused. For this reason, Counsel for the 4th and 5th accused referred this case before this Court for revision.

The main contention of the 4th and 5th accused Counsel, is that the forfeiture orders on P24 and the said goods should not have been made by the learned Magistrate before the case against the other co-accused is disposed of. This deprived the 4th and 5th accused of being heard relating to their respective legitimate rights to P24 and the said goods. In supporting her contention, the defence Counsel submitted to this Court various authorities, the most relevant of which is *Keng Soon Finance Bhd. v. Pengarah Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249.

Under s. 126 of the Customs Act 1967:

> all goods liable to seizure under this Act, shall be liable to forfeiture.

Under s. 127(1) of the Customs Act it states that if there is prosecution:

> an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the Court that an offence against this Act or any regulation made thereunder has been committed and the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence.

Under s. 128(2) of the Customs Act, it states that in the event that there is no prosecution, a person asserting that he is the owner of such goods can give written notice to a senior officer of customs to make his claim of the goods seized under the said Act. The matter will then be referred to the Court and a summons will then be issued to the owner to appear before the Court.

Section 128(4) of the Customs Act then provides that the Court:

> shall proceed to the examination of the matter and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods..., to be forfeited.

The learned Counsel in quoting to this Court the judgment in the *Keng Soon Finance* case, seemed to imply that before a forfeiture order under s. 127 of the Customs Act can be made the Court must:

> consider the whole of the matter including, *inter alia*, the goods found in the conveyance, the nature of the goods, whether dutiable or otherwise, and all the circumstances surrounding the particular case. (the quoted parts are from the judgment at p. 250 in the *Keng Soon Finance* case).

This Court finds that the said selected passage of the Federal Court decision does not give a true and accurate picture of what was decided.

The important condition to be fulfilled before a forfeiture order can be made both under ss. 127 and 128 of the Customs Act is for the Court to be satisfied that an offence under the said Act or any regulations made thereunder has been committed.

Under s. 127 of the Customs Act, the time for deciding this issue is usually when the case against the accused person or persons is being heard.

Under s. 128 of the Customs Act, since there is no prosecution, this issue can only be heard by way of a separate procedure stated under this particular section. In doing so the Court must be:

> satisfied after considering the whole of the material before it that an offence against the Act has been committed and that the goods were the subject matter or the vehicle was used in the commission of such an offence. (*Keng Soon Finance* case).

In this present case before this Court, the first question is, whether an offence under the Customs Act or the regulations made thereunder has been committed? The answer to this question is in the affirmative. The 2nd and the 3rd accused had pleaded guilty to the charge and as such an offence has indeed been committed. The Customs Act never specified that before a forfeiture order can be made, the owner of the goods or the conveyance must be guilty of an offence. Therefore as long as an offence is committed under the Customs Act or the regulations made thereunder by whosoever who is being charged, the Court must make a forfeiture order provided always that the goods were the subject matter of the offence or the conveyance was used in the commission of such an offence.

The second question to be followed in respect of this case is whether the goods were the subject matter of the offence and the conveyance was used in the commission of such an offence? In this respect, this Court finds that the said goods and P24 were the subject matter and the conveyance used in the commission of the offence which was pleaded guilty to by the 2nd and 3rd accused. This is ascertained from the facts tendered by the prosecution and admitted to by the 2nd and 3rd accused, after they had pleaded guilty to the charge.

Once the aforesaid conditions are fulfilled it is mandatory upon the Court to make a forfeiture order. This is so stated in the *Keng Soon Finance* case.

The word “shall” in ss. 127(1) and 128(4) of Customs Act clearly imposes upon the Court an obligation to order forfeiture once the stated preconditions are satisfied. It does not impose upon the Court a discretion to call the owner and anyone else who may have a legitimate interest in the goods, an opportunity to show cause why it should not be forfeited. If Parliament had intended to give an opportunity to show cause why the

goods should not be forfeited then it would have enacted relevant provisions to provide for the same. Since there are none, the word "shall" must be interpreted in the ordinary sense to imply a mandatory duty.

In view of the aforesaid, this Court rules that the forfeiture orders made by the learned Magistrate on the said goods and P24 are correct and, there are no reasons to order otherwise.

Also found at [1991] 2 CLJ 1596